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April 6, 2018

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Indiana Utility Regulatory Commission
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RE: Reply to Duke Energy Indiana's Response to CAC and ELPC Objection

Reply to Duke Energy's Response to Objection on behalf of
Citizens Action Coalition and the Environmental Law & Policy Center

Pursuant to Rule 170 IAC 1-6-7(d)(1), which states that 30-Day filings that have not been resolved to the satisfaction of the objector shall not be presented for Commission approval, Citizens Action Coalition ("CAC") and the Environmental Law & Policy Center ("ELPC") respectfully submit this Reply to express their lack of satisfaction with Duke Energy Indiana, LLC's ("Duke Energy") Response, filed on April 2, 2018, to CAC and ELPC's Objection filed on March 23, 2018. The Commission's procedures allow a party to reply to a response in similar contexts. *See, e.g.* 170 IAC 1-1.1-12(f). The Objections and Response at issue concerns Duke Energy's 30-day filing, filed on February 23, 2018, IURC 30-Day Filing No. 50119.

Duke Energy's response failed to satisfy ELPC and CAC's objection, as required by 170 IAC 1-6-7(d)(1), and the response raised a number of issues demonstrating why the Commission should open an investigation into Indiana's implementation of PURPA. There are five key reasons why the Commission should deny Duke Energy's 30-day filing and open an investigation into Indiana's PURPA implementation.

1. **Duke Energy's Proposed Failure to Offer a Fixed Rate in its Standard Contract Conflicts with Federal Law.**

In its response, Duke Energy admitted that the rate in its standard contract changes every year annually, and this annual update does not allow qualifying facilities ("QFs") to obtain contracts longer than one-year with a rate fixed over a whole term. *See* Duke Response at 1 ("The standard contract. . . provides for a fixed rate. . . which is refreshed each year").

Duke Energy's admission demonstrates that its standard contract does not comply with federal law. The annual refresh to the avoided cost in Duke Energy's standard contract conflicts with 18 C.F.R. § 292.304(d)(2)(ii), which "requires QFs to have the option of fixing the contract price for the delivery of energy and capacity "at the time the obligation is incurred." *See Allco Renewable Energy Ltd v. Massachusetts Electric Co.*, 208 F. Supp. 3d 390, 400 (D. Mass. 2016) *aff'd* 875 F.3d 64 (1st Cir. 2017) (lack of option to obtain fixed rate in long term contracts renders state's PURPA implementation in conflict with PURPA); *Winding Creek Solar LLC v. Peevey*, _ F. Supp. 3d. _, No. 13-04934, 2017 WL 6040012, at *10 (N.D. Cal. 2017) (PURPA

standard contract without option to fix rates over entire term conflicts with PURPA).

The North Carolina Utilities Commission ("NCUC") recently rejected Duke Energy Carolinas, LLC, similar proposal to change the avoided cost rates in its standard contract every two years.[1] The NCUC explained:

> The Commission determines, for purposes of this case, that Duke's proposed two-year reset in the avoided energy rate component of the standard offer rate should not be adopted at this time. While some larger facilities may be able to negotiate for different terms and degrees of certainty with regard to securing capital and return on investment, the proposed two-year energy rate reset for facilities eligible for the standard offer rates adds an additional element of uncertainty to their ability to reasonably forecast their anticipated revenue, which may make obtaining financing more difficult than a longer term, fixed-rate PPA.[2]

Annual avoided cost updates, like those proposed by Duke Energy in Indiana, would be even more uncertain than Duke Energy's unsuccessful biennial update proposal in North Carolina. According to the testimony of Cypress Creek Renewables, a QF developer in North Carolina, annual or biennial change to contract prices make QF financing prohibitively difficult:

> Cypress Creek argues that financing parties would view a ten-year PPA with a two-year readjustment to the avoided energy rate no more favorably than they would a two-year contract, which would not be financeable. Cypress Creek witness McConnell testified that rates fixed over the term of the contract are critical to securing financing, stating that "fixed rates for a fixed period of time create financeable contracts," and that what creates value in the contract is having a set avoided cost rate for a set period of time. He further testified that without these fixed rates, lenders are unwilling to bet on what the avoided cost rates will be going forward.[3]

Duke's failure to offer QFs the choice of a long-term fixed rate contract conflicts with PURPA, as interpreted by FERC and other recent state commission orders. In addition, the lack of fixed rate contracts and its negative effect on QF development is an issue the Commission should investigate further, and the Commission should require Duke Energy offer QFs the ability to fix rates over an entire term, as required by PURPA.

2. Duke Energy's One-year Standard Contract is not "Long Term," as Required by Indiana Law.

In its response, Duke Energy admitted that, in practice, it only offers one-year term lengths for its standard contract, and Duke Energy claimed that its one-year standard contract

[1] *See In re Biennial Determination of Avoided Cost Rates for Electric Utility Purchases from Qualifying Facilities – 2016*, Docket No. E-100 SUB 148, Order at 7 ¶ 10 (N. C. Pub. Util. Comm'n Oct. 11, 2017) *available at* https://perma.cc/UUJ6-2G5Q.
[2] *Id*., Order at 69.
[3] *Id*., Order at 67.

length "should be sufficient to obtain third-party financing." Duke Response at 3. However, Duke Energy's belief that one-year term lengths are sufficient conflicts with the affidavit of a potential QF developer that stated that term lengths of 15- to 20-years are required to obtain financing. *See* Affidavit of Sam Kliewer at ¶ 3.[4]

The drastic difference of opinion between potential QF developers and Duke Energy demonstrates the need for Indiana to investigate the issue of adequate contract term lengths further. One-year contracts are not "long term," as required by Indiana law. Burns Ind. Code Ann. § 8-1-2.4-4(a).

3. Duke Energy's Reliance on a Recent Alabama Public Service Commission Decision is Misplaced.

Duke Energy's response cited a decision from Alabama but its reliance on this decision is misplaced. In that decision, the Alabama Public Service Commission ("APSC") found Alabama Power Company's ("Alabama Power") one-year standard contract was sufficiently long to encourage development. Duke Response at 2-3. Unlike Indiana, however, Alabama law has no requirement for "long term" contracts. *See* Burns Ind. Code Ann. § 8-1-2.4-4(a).

In addition, a review of APSC Docket No. 5213 shows that the only party involved in the proceeding was the utility, and Alabama Power introduced no evidence concerning the adequacy of its proposed one-year standard contracts.[5] In that case, because the only party involved was the utility, the issue of contract length was not contested or litigated. Accordingly, the Commission should afford it little weight on the issue of adequate contract length.

APSC's decision also conflicts with the well-reasoned decisions of Michigan, Oregon, and Wyoming where those states determined 20-year standard contracts were adequate and necessary.[6] A review of EIA data containing a list of all generators shows that Alabama Power only has two small power production QF on its system.[7] In contrast, Oregon, with 20-year term lengths, has *sixty-one* small power production QFs in the state. As the comparison demonstrates, Alabama Power's one-year term lengths, like Duke Energy's, do not encourage QF development.

Indiana law requires long-term contracts, Burns Ind. Code Ann. § 8-1-2.4-4(a), and Duke Energy's one-year standard contract fails to comply with this requirement.

4. Duke Energy Has Not Complied With All Requirements of 18 C.F.R. § 292.302(b).

In its response, Duke Energy admitted that it has not filed any information in compliance with 18 C.F.R. § 292.302(b) since its November 2015 integrated resource plan ("IRP"). Duke Response at 4. Accordingly, because 18 C.F.R. § 292.302(b) requires this information to be filed

[4] This affidavit was filed with ELPC and CAC's Objection to NIPSCO's 30-day filing.
[5] The only filing in the docket before the APSC's March 7, 2017 Order was Alabama Power's initial filing, which contained no evidence as to the sufficiency of its one-year standard contract. *See In re Alabama Power Co*., Docket No. U-5213, Initial Filing (Feb. 21, 2017) *available at* https://perma.cc/P2TZ-RW4Y
[6] A detailed explanation of these states' reasons for 20-year terms can be found in ELPC and CAC's Objection to Duke Energy's 30-day filing on page 5.
[7] https://www.eia.gov/electricity/data/eia860/ (last updated Nov. 2017)

at least every two years, Duke Energy is not in compliance with this biennial requirement.

In addition, although Duke Energy's November 2015 IRP does show its planned capacity additions over the next ten years,[8] as required by 18 C.F.R. § 292.302(b)(2), nowhere in the IRP does it contain the "estimated capacity costs at completion of the planned capacity additions and planned capacity firm purchases, on the basis of dollars per kilowatt, and the associated energy costs of each unit, expressed in cents per kilowatt hour." 18 C.F.R. § 292.302(b)(3).

Perhaps these estimated capacity costs are available in the non-public version of the IRP, but that too fails to comply with the regulation. The regulation states that utilities "shall maintain for public inspection" these "estimated capacity costs." 18 C.F.R. §§ 292.302(b), 292.302(b)(3). The "public inspection" requirement preempts application of trade secret or confidential treatment of the information required to comply with this regulation.[9] If Duke Energy wants to use its IRP to comply with 18 C.F.R. §§ 292.302(b)(3), then it cannot shield those estimated capacity costs from public view.

Duke Energy's and other utilities' lack of compliance with 18 C.F.R. § 292.302(b) undermines the purpose of these avoided cost informational filings and this lack of compliance demonstrates the need for Indiana to investigate the issue further.

5. There Are Currently No Federal Investigations or Rulemakings into PURPA, and Even If There Were, It Should Not Stop the Commission from Exercising its Duly-delegated Authority to Implement PURPA and State Law.

Duke Energy believes an investigation of PURPA implementation is not warranted in Indiana because there are already federal investigations into PURPA ongoing and therefore the State should allow the federal government to dictate what Indiana should do. Duke Response at 4-5. However, contrary to Duke Energy's assertions, there are no active FERC investigations or rulemakings related to PURPA. Duke Energy cited to a FERC order soliciting comments in Docket AD16-16, but FERC created that docket solely for its 2016 PURPA technical conference.[10] Conference participants filed their comments in Fall 2016, and FERC has taken no action and conducted no investigation or rulemaking following those comments.

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[8] Duke Energy Indiana , 2015 INTEGRATED RESOURCE PLAN at 158 (Nov. 2015), *available at* https://perma.cc/XZB7-QNDT.

[9] *See In Re Investigation of Central Maine Power Company's Resource Planning, Rate Structures, and Long-Term Avoided Costs (Rate Design Phase)*, Docket No. 92-315, 1995 Me. PUC LEXIS 11 at *13-14 (Jan. 27, 1995 Me. Pub. Util. Comm'n). The Maine Public Utilities Commission stated:

> Plainly, under this federal regulation, the specified avoided cost information must be filed with state regulatory agencies and the information must be publicly available. The federal regulation expressly regulates state activities and, under the supremacy clause, undoubtedly precludes any state action that would make the specified information not publicly available, e.g., pursuant to state trade secret protection law.

Id. at *13.

[10] *See Notice of technical conference re Implementation Issues under the Public Utility Regulatory Policies Act of 1978*, Docket No. AD16-16 (F.E.R.C. Feb. 9, 2016) available at https://perma.cc/TKU5-CBW9; *see also Supplemental Notice Concerning Technical Conference*, Docket No. AD16-16 (F.E.R.C. Mar. 4, 2016) available at https://perma.cc/A9TV-DLZW.

Duke Energy misrepresented statements made by FERC's Chairman Neil Chatterjee. On October 30, 2017, Representative Tim Walberg sent a letter to FERC asking FERC to update its PURPA regulations. *See* Exhibit B. On November 29, 2017, FERC Chairman Neil Chatterjee responded with a two-paragraph letter and did not initiate an investigation or rulemaking in response to Walberg's letter. *See* Exhibit C. Nevertheless, Duke Energy attempts to use an excerpt of Neil Chatterjee's letter to explain "the purpose of this investigation," Duke Response at 4, even though no such investigation exists and the Chairman's letter does not reference an active investigation or rulemaking.

Duke Energy also cited to a recent bill introduced in Congress as evidence of another federal investigation. That bill, titled the PURPA Modernization Act, H.R. 4476, has sat in a House of Representative subcommittee since December 1, 2017 and has yet to be offered up for a vote.[11] Even if it passes the committee stage, it is unlikely to pass the full House of Representatives or the Senate. In addition, the legislation only effects the size of QFs and how PURPA could interact with integrated resource plans—it has nothing to do with adequate contract term lengths under Indiana law or compliance with 18 C.F.R. 292.302(b).

Duke Energy's reliance on federal activity as a reason for why the Commission should not open an investigation rings hollow. PURPA operates under a cooperative federalism framework whereby FERC issued the primary regulations but the State of Indiana is delegated authority to implement those regulations at the state level. *See* 16 U.S.C. § 824a-3(f). Indiana has adopted state laws and regulations to implement these requirements, including a state law that directs the commission to require electric utilities to enter into long-term contracts with alternate energy production facilities. Burns Ind. Code Ann. § 8-1-2.4-4(a). The existence, or not, of federal proceedings related to PURPA in no way negates the Commission's responsibility to implement and enforce existing state law. Finally, as Duke Energy noted, PURPA provides the Commission with the discretion to determine issues like contract term lengths, Duke Response at 1, and therefore Indiana's discretion and authority to investigate such issues is unaffected by the hypothetical existence of federal investigations into matters unrelated to Indiana's requirement for "long term" contracts. Burns Ind. Code Ann. § 8-1-2.4-4(a).

Indiana should use its considerable discretion under PURPA to deny approval of Duke Energy's 30-day filing and open an investigation into PURPA implementation in the State. Issues for investigation should be adequate contract term lengths, compliance with 18 C.F.R. 292.302(b)'s biennial avoided cost information requirements, and other issues that the Commission determines are relevant. Other relevant issues could be how utilities calculate their avoided energy cost rates and whether the standard offer tariff and standard contracts should be available to QFs larger than 100 kW.

Dated April 6, 2018

Respectfully submitted,

Jennifer A. Washburn

[11] *See* https://www.congress.gov/bill/115th-congress/house-bill/4476/all-actions

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AD 16-16

Congress of the United States
Washington, DC 20515

October 30, 2017

The Honorable Neil Chatterjee
Chairman
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Dear Mr. Chairman:

We are writing to urge the Federal Energy Regulatory Commission (FERC) to update its implementing regulations for the Public Utility Regulatory Policies Act (PURPA). As you know, PURPA was enacted in 1978 in response to an oil crisis. Over the last 40 years, we have seen dramatic changes in energy markets that have resulted in an abundance of domestic energy supplies. Two of the most significant changes have been the development of competitive wholesale electricity markets, which enable qualifying facilities (QFs) under PURPA to reach more willing buyers, and the declining costs for natural gas and renewable energy resources. These developments, along with others, have changed both the economics of QF development, as well as the impact of an increasing amount of QF output being placed on the transmission grid.

While there are aspects of the reform of PURPA that will require congressional action, there are also regulatory changes that FERC can make to ensure that its implementing regulations reflect the changes occurring in electricity markets. Many of these changes are already familiar to FERC and were addressed at the technical conference that your agency held on June 29, 2016, in Docket No. AD16-16-000. Among the issues addressed at the conference was the purported gaming of FERC's "one-mile rule" (*see* 18 CFR § 292.204(a)(2)) by certain QF developers. More than a year later, the House Energy and Commerce Subcommittee on Energy heard testimony during its September 6, 2017, hearing on PURPA, that some QFs are continuing to take advantage of FERC's regulations to effectively build projects that exceed the various size thresholds in the wholesale electricity markets regulated by FERC. However, since FERC has made clear in its decisions that its one-mile rule is irrebuttable, parties involved cannot challenge the lawfulness of these projects.

Eliminating the opportunity for certain QF developers to game FERC's one-mile rule will directly benefit electricity customers, who are paying billions of dollars in above-market prices for QF power sold under mandatory PURPA contracts. While the Energy and Commerce Committee considers additional reforms to PURPA, we encourage FERC to address the concerns raised at its 2016 technical conference and to use its authority to undertake needed modernization to the Commission's PURPA one-mile rule regulations while taking into consideration non-geographic factors as well.

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As Congress continues its review of PURPA, we request the list of changes and reforms the Commission believes it can make under its existing authority.

We look forward to working with the Commission to ensure our constituents can benefit from lower cost electricity, more competitive markets and advancements made in renewable generation.

Sincerely,

Tim Walberg
Member of Congress

Fred Upton
Member of Congress

Joe Barton
Member of Congress

Marsha Blackburn
Member of Congress

Robert E. Latta
Member of Congress

Gregg Harper
Member of Congress

David B. McKinley, P.E.
Member of Congress

H. Morgan Griffith
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FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

November 29, 2017

OFFICE OF THE CHAIRMAN

The Honorable Tim Walberg
U. S. House of Representatives
Washington, *D.C. 20515*

Dear Congressman Walberg:

Thank you for your October 30, 2017, letter regarding the Public Utility Regulatory Policies Act of 1978 (PURPA).

The energy landscape that existed when PURPA was conceived was fundamentally different than it is today; solar and wind power were fledgling technologies, there was no open access to wholesale electricity markets, and natural gas was in scarce supply. None of those things are true today. In light of such changes, I believe that the Commission should consider whether changes in its existing regulations and policies could better align PURPA implementation with modern realities.

As you know, the Commission held a technical conference on June 29, 2016, in Docket No. AD16-16-000, to examine issues related to PURPA. Subsequently, the Commission solicited written comments from interested parties, which were submitted by November 7, 2016. One particular area where many parties have indicated a need for a different approach is the "one-mile rule" for qualifying facilities. Of course, other such areas may exist, too, and we owe it to stakeholders to continue taking a hard look at our regulations to identify those opportunities for improvement. Please be assured that I will keep your concerns in mind as the Commission explores these important issues. Your letter and this reply will be placed in the public record of Docket No. AD16-16-000.

If I can be of any further assistance, please do not hesitate to contact me.

Sincerely,

Neil Chatterjee
Chairman

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